

REMARKS

Claims 1-7 and 9-12 are pending in this application. Claims 1; 2 (now incorporated into claim 1); 4 (now amended to depend from claim 1); 6; and 12 have been amended to overcome claim objections and a rejection for indefiniteness. Claim 1 has been further amended to include the limitations of claims 2 and 3. Therefore, claims 2 and 3 have been cancelled. Furthermore, it has now been clarified that the return edges extend perpendicularly from *and past* the face plate. This clarifying amendment does not introduce subject matter that has not been previously searched by the Examiner, as discussed in more detail below. No claims have been added. Therefore, claims 1, 4-7 and 9-12 remain in this application.

Claim Objections

Claims 1, 4, 6, and 12 stand objected to for informalities. Applicant has amended these claims as required by the Examiner and believes that these amendments overcome the Examiner's informality objections. Reconsideration of these objections is respectfully requested.

35 U.S.C. §112 Rejections

Claim 2 stands rejected under 35 U.S.C. §112, second paragraph, for indefiniteness for insufficient antecedent basis. Applicant has replaced the term "rigid member" with "face plate". Reconsideration of this rejection is respectfully requested.

35 U.S.C. §103 Rejections

Claims 1-4, 6, 7, and 9 stand rejected under 35 U.S.C. §103(a) for obviousness based upon the teachings of U.S. Patent No. 195,723 to Nellis, in view of U.S. Patent No. Re. 32,707 to Robbins, Jr., and further in view of U.S. Patent No. 3,552,613 to Nye. Specifically, the Examiner asserts that it would have been obvious to combine the "fence post and fastener" teaching of the Nellis patent *with* the "fence rail" teaching of the Robbins Jr. patent *with* the metal buckle (FIG. 2 & 3) of the Nye patent to obtain the claimed invention set forth in at least claims 1-3 (the limitations of claim 2 and 3 have been incorporated into claim 1 by the foregoing amendment).

Contrary to the Examiner's position on claim 2, there are no return edges on the bracket "b" in FIG. 5 of the Nellis patent. The Examiner equates the claimed return edges to the "side edges defining the thickness of the face plate." However, Applicant's original claim terminology of "extending perpendicularly *from* the face plate", in an ordinary meaning interpretation, clearly means that a portion of the face plate is directed away from the face plate. Edges that are inherent in the face plate cannot be considered to extend perpendicularly from the face plate. The Examiner's interpretation would be reasonable if the claim language recited return edges extending perpendicularly on (or along) the face plate. In any case, Applicant has amended claim 1 for purposes of clarity of understanding for the Examiner to require that return edges extend perpendicularly from *and past* the face plate. Applicant believes that the "past" limitation is inherent in the original wording and therefore does not limit the scope of the claim beyond its original scope.

Contrary to the Examiner's position on claim 3, the Nellis patent fails to disclose a fastener which permits the connector to pivot about the fastener. The Examiner asserts that the slotted connector "B" of the Nellis patent may pivot about the lower rivet prior to insertion of screw "b¹". However, as shown in FIG. 3, the rivet is used to connect post Section A to ground Section C. Section B is aligned with Section A to allow the spring or tongues "b" (equated to the slots in the present claimed invention) of Section B to pass through respective slots "a¹" of Section A. Regardless of whether or not screw "b¹" is inserted into the top portion of Section B (to lock Section B against Section A), Section B cannot pivot because the rivet at the bottom of Section A does not pass through Section B. This is clearly shown in FIG. 2 of the Nellis patent.

It is settled law that "[a] claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." *Verdegaal Brothers Inc. v. Union Oil Co. of California*, 2 USPQ2d, 1051, 1053 (Fed. Cir. 1987). In light of the aforementioned amendments and arguments made with respect to the anticipation rejections under the Nellis patent, whose underlying anticipation teachings, now refuted, are used for rejecting claim 1 on an obviousness basis in view of the Robbins, Jr. and Nye patents, Applicant hereby respectfully requests that the Examiner withdraw the overall obviousness rejection of amended claim 1.

Furthermore, Applicant would first like to point out that the Nellis patent discloses a fence post used to secure rails at intermediate portions thereof, as opposed to end portion of such rails, as is set forth in claim 1. Therefore, the Nellis patent fails to disclose the pivoting function with respect to rails attached thereto. In contrast to the Nellis fence post disclosure, the present invention allows for individually connected rails to pivot such that a fencing arrangement may be implemented across any uneven or angled terrain.

A functional purpose of the claimed return edges of the present invention is to help align the rail to the connector during and after installation. Additionally, the return edges protect livestock from the edges of the rail, which might otherwise (especially when the rail edge is damaged or frayed) cause injury to the livestock. These functional aspects or the claimed return edge structural limitation are not found in any of the prior art of record.

The metal buckle of the Nye patent is described as being a flat metal plate (*See* column 2, lines 13-15). Therefore, the fence rail disclosed in the Robbins, Jr. patent would be incompatible with the metal buckle of the Nye patent in that a metal plate would be susceptible to deformation in the context of tensioning the Robbins, Jr. fence rail during installation or when force is exerted against the rail by an animal. Furthermore, the teachings derived from the Nye patent are not in an analogous art. However, according to relevant case law, a “reference is reasonably pertinent if, even though it may be in a different field from that of the inventor’s endeavor, it is one which, because of the matter with which it deals, logically would have commended itself to an inventor’s attention in considering his problem” (*Wang Laboratories Inc. v. Toshiba Corp.*, 993 F.2d 858, 26 USPQ2d 1767 (Fed. Cir. 1993)). The Nye patent is clearly in a different field from that of the inventor’s endeavor. An inventor attempting to secure a fence rail would not have looked at the art of cargo nets used to support cargo in an elevated position above a boat or canoe bottom. Specifically, the buckle in the Nye patent is used for tightening woven straps that hold a vertical load, whereas the buckle of the present invention is used to secure ends of sturdy fence rail and withstand horizontal loads applied thereto.

The Examiner rejects claim 10 (directed to the joining connector) based upon the teachings of the Nellis patent in view of the Robbins, Jr. patent, in view of the Nye patent, and further in view of U.S. Patent No. 5,644,822 to Frew. The buckle disclosed in the Frew

patent is of plastic construction (*See* column 1, lines 31-32). Accordingly, as discussed above in connection with the Nye patent, the plastic buckle of the Frew patent is susceptible to deformation or even breakage in the context of tensioning the Robbins, Jr. fence rail during installation or when force is exerted against the rail by an animal. Accordingly, the Frew buckle would not be suitable for use in the claimed fencing system.

It has been held that the references used to attempt to obviate a claim must suggest the desirability and thus the obviousness of making the combination (*Hodosh v. Block Drug Co., Inc.*, 786 F.2d 1136, 1143 n.5, 229 USPQ 182, 187 n.5 (Fed. Cir. 1986)). Furthermore, when interpreting the patentability of a claim, the law requires that a reference be considered for all of its teachings, *including disclosure that diverges and teaches away from the invention at hand* as well as disclosures that point toward and teach the invention. *In re Dow Chem. Co.*, 837 F.2d 469, 5 USPQ2d 1529 (Fed. Cir. 1988), *KSR v. Teleflex*, 550 U.S. ____ at 12, 127 S. Ct. 1727 (2007), citing *In re Kahn*, 441 F.3d 977 (Fed. Cir. 2006)). The Frew patent teaches away from the use of the disclosed buckle in connection with a plastic rail. As shown in FIGS. 4 and 5, the Frew buckle includes abraded surfaces (11) which impart frictional force against a traditional flimsy webbed strap (*See e.g.*, column 2, lines 35-42). In contrast, the present invention solely utilizes tension in conjunction with deformation of the plastic fence rail to keep the fence rail secured to the joining connector. Thus, there is no need for having a gripping or abraded surface integrated in the joining connector of the present invention. In fact, such an abraded surface would be functionally useless because the plastic fence rail is substantially smooth and does not contain webbed material that could engage the abraded surface. Therefore, one having ordinary skill in the art would not have looked to the teachings of the Frew patent for the purpose of selecting a suitable joining connector for use in the claimed fencing system.

Applicant hereby incorporates by reference the previously submitted 1.132 Declaration filed on October 25, 2007, in which Applicant details the commercial success of the present invention as evidenced by substantial sales thereof. (*See* Section 5). The Court of Appeals for the Federal Circuit stated in *Stratoflex, Inc. v. Aeroquip Corp.*, 713 F.2d 1530, 1538, 218 USPQ 871, 879 (Fed. Cir. 1983) that “evidence rising out of the so-called ‘secondary considerations’ [such as commercial success] must always when present be

considered en route to a determination of obviousness” (*See also KSR v. Teleflex*, 550 U.S. ____ at 2).

For the foregoing reasons, Applicant believes that the subject matter of independent claim 1 and the claims depending therefrom are not rendered obvious by any of the prior art of record. Reconsideration of the rejection of independent claim 1 and the claims depending therefrom is respectfully requested.

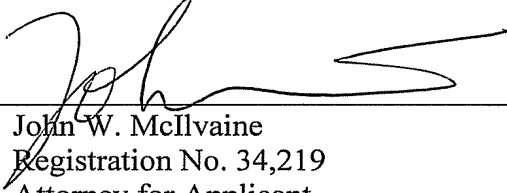
CONCLUSION

Based on the foregoing remarks, reconsideration of the rejections and allowance of pending claims 1, 4-7 and 9-12 are respectfully requested.

Respectfully submitted,

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